



6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket Nos. 07-42 and 17-105; FCC 19-52]

Leased Commercial Access; Modernization of Media Regulation Initiative

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission updates its leased access rules as part of its Modernization of Media Regulation Initiative. First, the Commission vacates its 2008 Leased Access Order, which never went into effect due to a stay by the U.S. Court of Appeals for the Sixth Circuit and the Office of Management and Budget issuance of a notice of disapproval of the associated information collection requirements. Second, the Commission adopts certain updates and improvements to its existing leased access rules.

DATES: Effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, except for §§76.970(h) and 76.975(e), which are delayed. The Commission will publish a document in the Federal Register announcing the effective date.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Diana Sokolow, Diana.Sokolow@fcc.gov, of the Policy Division, Media Bureau, (202) 418-2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, FCC 19-52, adopted on June 6, 2019 and released on June 7, 2019. The full text is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW, Room CY-A257, Washington, DC 20554. This document will also be available via ECFS at <http://fjallfoss.fcc.gov/ecfs/>. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat. Alternative formats are available for people with disabilities

(Braille, large print, electronic files, audio format), by sending an e-mail to fcc504@fcc.gov or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

Synopsis:

1. In the Report and Order, we update our leased access rules as part of the Commission's Modernization of Media Regulation Initiative. The leased access rules, which implement the statutory leased access requirements, direct cable operators to set aside channel capacity for commercial use by unaffiliated video programmers.¹ In 2018, the Commission adopted a Further Notice of Proposed Rulemaking (FNPRM) addressing leased access proposals filed in response to the Media Modernization Public Notice. With this proceeding, we continue our efforts to modernize media regulations and remove unnecessary requirements that can impede competition and innovation in the media marketplace.

2. The video marketplace has changed significantly since the Commission initially adopted its leased access rules. Specifically, today a wide variety of media platforms are available to programmers, including in particular online platforms that creators can use to distribute their content for free. This change has reduced the importance of leased access and, thus, the justification for burdensome leased access requirements.

3. Below, first we adopt the FNPRM's tentative conclusion that we should vacate the Commission's 2008 Leased Access Order.² That order never went into effect due to a stay by the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) and the Office of Management and Budget (OMB) issuance of a notice of disapproval of the associated information collection requirements. Second, we adopt certain updates and improvements to our existing leased access rules.

¹ The leased access rules are in subpart N of part 76, which was listed in the Media Modernization Public Notice as one of the principal rule parts that pertains to media entities and that is the subject of the media modernization review.

² Federal Communications Commission, Leased Commercial Access, 73 FR 10675 (final rule), 10732 (proposed rule) (Feb. 28, 2008).

4. Vacating the 2008 Leased Access Order. We adopt the FNPRM's tentative conclusion that we should vacate the 2008 Leased Access Order, including the Further Notice of Proposed Rulemaking issued in conjunction with that order. We conclude that this approach, which cable operators support, is consistent with our public interest objectives and is the most practical and legally tenable option available to us. Specifically, vacating the prior order will clarify the status of our leased access regime, further the Commission's media modernization efforts, and obviate the need to address the significant legal concerns raised in the related Sixth Circuit proceeding and OMB Notice.³

5. By vacating the 2008 Leased Access Order, we are resolving the longstanding challenges to the order that have been pending for more than a decade due to the stay of this order.⁴ Vacating the 2008 Leased Access Order will not have any impact on any party's compliance with or expectations concerning the leased access requirements, because the rule changes contained in that order never went into effect.⁵ Accordingly, as a result of our decision today, except for the rule changes set forth below, parties simply will remain subject to the same leased access rules they were operating under prior to 2008.

6. Vacating the 2008 Leased Access Order is consistent with the Commission's media modernization efforts, pursuant to which we seek to remove rules that are outdated or no

³ Because we vacate the 2008 Leased Access Order, we also dismiss as moot the related NCTA FCC Stay Request, which asked the Commission to stay the 2008 Leased Access Order, and the TVC Recon Petition, which sought reconsideration of the 2008 Leased Access Order.

⁴ Vacating the 2008 Leased Access Order eliminates the need to move forward with the judicial proceedings currently pending in the Sixth Circuit. The Sixth Circuit Stay Order, which has been in effect for over a decade, recognized "that NCTA has raised some substantial appellate issues" pertaining to the rules adopted in the 2008 Leased Access Order. Similarly, vacating the 2008 Leased Access Order eliminates the need to overcome OMB's denial of the information collection requirements associated with major portions of the 2008 Leased Access Order. OMB detailed the ways in which certain requirements adopted in the 2008 Leased Access Order were inconsistent with the PRA, including the Commission's failure to demonstrate the need for the more burdensome requirements adopted, its failure to demonstrate that it had taken reasonable steps to minimize the burdens, and its failure to provide reasonable protection for proprietary and confidential information.

⁵ We need not make any modifications to our rules to reflect our vacating of the 2008 Leased Access Order because the leased access rules that are currently in effect, and that currently appear in the Code of Federal Regulations, are those that were in existence prior to the 2008 Leased Access Order.

longer justified by market realities. As commenters point out, implementing the 2008 Leased Access Order would have made leased access significantly more burdensome for cable operators, which would be contrary to the highly competitive marketplace in existence today. For example, NCTA explains that implementing the 2008 order “would have changed the formula for establishing the maximum permissible rate for leased access in a manner that would have resulted in rates approaching zero.” We agree with commenters that in today’s marketplace the appropriate course is to ease, rather than increase, regulatory burdens associated with leased access and that the Commission should not have leased access regulations where the maximum allowable rates approach zero. Indeed, as discussed below, today we find that certain rule changes are needed to provide cable operators with relief from their existing leased access burdens because the burdens are no longer justified in today’s marketplace, given the increased distribution alternatives for leased access programmers. While we recognize that some leased access programmers have expressed a preference for leased access via cable as compared to alternatives such as online programming distribution, we are persuaded that these alternatives have developed into a viable substitute for leased access today. In addition, we note that easing the regulatory burdens associated with leased access will effectuate the statutory requirement to implement rules “in a manner consistent with the growth and development of cable systems.”

7. We disagree with commenters claiming that the Commission should “adopt the parts [of the 2008 Leased Access Order] that are not subject to OMB or Sixth Circuit . . . scrutiny and either staff review or issue a FNPRM to address the issues of concern to the OMB and the Appeals Court.”⁶ The FNPRM sought comment on whether there is “any policy justification for retaining any particular rules adopted” in the 2008 Leased Access Order. Commenters advocating the retention of all portions of the 2008 Leased Access Order “that are not subject to

⁶ We also reject LAPA’s request that the Commission adopt customer service standards akin to those in the 2008 Leased Access Order, finding instead that the contact information requirement we adopt below is sufficient at this time and appropriately balances the burdens on cable operators with the needs of leased access programmers.

OMB or Sixth Circuit . . . scrutiny” do not explain with sufficient specificity which rules from the 2008 Leased Access Order should go into effect and why they are justified today. We believe that vacating the entire order and proceeding anew is preferable to commenters’ suggested piecemeal approach.

8. Modifying the Leased Access Rules. We next adopt certain updates and improvements to our existing leased access rules. It is our goal to modernize our leased access regulations given the significant changes in the video marketplace, including specifically the availability of online media platforms. We stated in the FNPRM that this proceeding would “advance our efforts to modernize our media regulations and remove unnecessary requirements that can impede competition and innovation in the media marketplace.” We find that the benefits of updating our leased access rules to reflect the current video marketplace outweigh the anticipated costs.

9. Part-Time Leased Access. We eliminate the requirement that cable operators make leased access available on a part-time basis. Instead, our leased access rules will apply only to leased access programmers that purchase channel capacity on a full-time basis⁷ for at least a one-year contract term. The Commission’s rules currently direct “[c]able operators that have not satisfied their statutory leased access requirements [to] accommodate part-time leased access requests,” but there is no statutory requirement for part-time leased access. And, contrary to SBN’s suggestion “that part-time access is the ‘genuine outlet’ Congress sought to promote with the leased access statute,” the legislative history does not mention part-time leased access. Further, we are persuaded by comments that because part-time leased access is regulatory, and not statutory, we should seek to avoid unnecessary burdens in light of possible First Amendment concerns.⁸ In response to the FNPRM’s request for further comment on this topic,⁹ cable

⁷ Leasing of a channel on a full-time basis will require that the channel is under the exclusive use of the programmer for the term of the contract.

⁸ SBN argues that there is no speech-related distinction between part-time access and full-time access, and

operators support elimination of the part-time leased access requirement.

10. We find that eliminating part-time leased access is consistent with marketplace changes. Since the Commission adopted the rule governing part-time leased access in 1993, the available platforms to distribute programming have multiplied, including in particular Internet options. At the same time, the part-time leased access requirement has continued to apply to cable operators, and the record indicates that those operators do not usually generate enough revenue from part-time leased access programming to cover the administrative costs of providing such programming.¹⁰ Even in the 1997 Leased Access Order, the Commission “recognize[d] that part-time leasing is not expressly required by the statute, that it may impose additional administrative and other costs on cable operators, and that it may pose the risk of capacity being under-used.” Unlike in 1997, when the Commission affirmed its rule requiring cable operators to lease time in 30-minute increments, however, our decision today reflects the fact that the Internet has developed into a flourishing means of distribution for short-form programming. SBN claims

thus the First Amendment concerns cannot be used to ban the former but not the latter. As an initial matter, as described above, our elimination of part-time leased access is sufficiently supported by policy justifications that are independent of our First Amendment concerns. In addition, we proceed here incrementally by eliminating the part-time leased access rules that impose speech burdens that are not required by statute. In the related Second FNPRM, we seek further comment on whether the statutory leased access requirements continue to withstand First Amendment scrutiny.

⁹ SBN is incorrect when it claims that the FNPRM did not provide sufficient notice of the elimination of part-time leased access. First, the FNPRM specifically sought comment on new rules governing part-time leased access. In response, commenters urged the Commission to adopt new rules that would no longer require cable operators to make leased access available on a part-time basis. We adopt such rules today, but permit existing part-time commercial leased access agreements to remain in place under their current terms. Cable operators have the discretion to negotiate future part-time agreements as a private contractual matter. Second, our new rules regarding part-time leased access are a logical outgrowth of the Commission’s request for comment on “whether our rules implicate First Amendment interests.” Finally, any argument regarding lack of notice is refuted by the fact that leased access programmers themselves opposed the elimination of part-time leased access in their initial comments.

¹⁰ These administrative costs include such matters as negotiating contracts and sending invoices, which cost the same for part-time leased access as for full-time leased access. SBN asserts that rather than eliminating part-time leased access, we should “revise the pricing rules in accordance with Section 612(c)(1) to cover the[] costs” that part-time leased access imposes on cable operators. We disagree that this is the appropriate course. We find that in light of the other platforms now available to distribute part-time programming, there is no longer a sufficient policy justification for part-time leased access. We also are mindful that simply adjusting the price that cable operators may charge for part-time leased access would not address the First Amendment concerns that it presents.

that the focus of leased access should be providing diverse information sources to cable subscribers. Eliminating part-time leased access, however, will not prevent leased access programmers from reaching all households with Internet access, including the households of cable subscribers. We find that the costs of mandating part-time leased access to provide programming to the small portion of the population without Internet access but with cable television outweighs the benefits. While we recognize the interest of leased access programmers in maintaining part-time leased access,¹¹ we are persuaded that the costs to cable providers associated with accommodating part-time leased access outweigh any countervailing benefits, especially given the plethora of alternative distribution options for such programming and the applicable First Amendment concerns.¹² To the extent that any cable operator wishes to carry programming on a part-time basis, it may negotiate such carriage as a private contractual matter, outside the scope of the leased access statute.

11. Because leased access will only occur on a full-time basis going forward, we delete section 76.970(h) of our rules, which currently addresses the maximum commercial leased access rate for part-time channel placement. Current § 76.970(i) and (j) will be redesignated as § 76.970(h) and (i). We also delete the reference to part-time leased access rates in current section

¹¹ SBN states that the “Report and Order does not address the effect of the abandonment of the part-time leasing regime on part-time programmers, most of whom (like SBN) are small businesses.” In the Final Regulatory Flexibility Analysis, we analyze the potential impact of the rule changes adopted herein on small entities. We recognize that the changes in the Report and Order that ease burdens on cable operators, such as the elimination of part-time leased access, may also impact leased access programmers, including small programmers. This outcome, however, is justified by marketplace changes, including in particular the availability of online platforms for these small programmers to distribute their content. SBN also claims that we have not examined the effect of the elimination of part-time leased access on barriers to market entry and the promotion of a diversity of media voices, which SBN contends is required by section 257 of the Act. In fact, we find, based on evidence in the record, that any entry barriers that existed for part-time programmers have been largely overtaken by the plethora of alternative distribution options for such programmers. Furthermore, in light of these alternative distribution options, elimination of part-time leased access should have at most a minimal adverse effect on the promotion of a diversity of media voices, and that effect is outweighed by the costs to cable operators of part-time leased access.

¹² Cable commenters provide that if we decline to eliminate part-time leased access entirely, we could adopt an alternative approach pursuant to which we could require a cable system to carry a leased access programmer only if the programmer provides a set minimum amount of leased access programming. Based on the record before us, we conclude that eliminating part-time leased access entirely is a preferable approach, given the alternative means of distribution available to programmers today and the costs that part-time leased access imposes on cable operators.

76.970(i)(1)(ii) (redesignated section 76.970(h)(1)(ii)), and we delete section 76.971(a)(4), which sets forth the current requirements for accommodating part-time leased access.¹³

12. Bona Fide Requests. We adopt the proposal set out in the FNPRM to ease burdens on cable operators by revising section 76.970(i) of our rules to provide that all cable operators, and not just those that qualify as “small systems”¹⁴ under that rule, are required to respond to a request for leased access information only if the request is bona fide. Larger cable systems currently must respond to all written leased access requests, which can be inefficient, difficult, and costly. We also make one change to our existing definition of a “bona fide request” for information, which currently is defined as a request from a potential leased access programmer that includes: “(i) The desired length of a contract term; (ii) The time slot desired; (iii) The anticipated commencement date for carriage; and (iv) The nature of the programming.” Specifically, we delete the second criteria (the time slot desired), because as explained above we eliminate part-time leased access and time slot thus will be irrelevant for programming that occupies a channel on a full-time basis. As proposed in the FNPRM, the criteria for a bona fide request must be met before a cable system will be required to provide the information specified in section 76.970(i)(1).

13. Adoption of this bona fide request provision will expand relief afforded small systems to all cable operators.¹⁵ Section 76.970(i)(1) currently directs cable operators to provide

¹³ Section 76.970(i)(1)(i) of our rules requires a cable operator’s response to a leased access request to include “[h]ow much of the operator’s leased access set-aside capacity is available.” ACA proposed that cable operators should be required to inform a potential leased access programmer only whether the specific time slot it requests is available, “rather than indicating the total amount of available leased access set-aside capacity.” Because we eliminate the part-time leased access requirement, ACA’s time slot proposal is no longer relevant. We clarify that going forward, we will permit cable operators to comply with section 76.970(i)(1)(i) by confirming whether there is a channel available for the prospective leased access programmer.

¹⁴ The leased access rules define a small system as either (i) a system that qualifies as small under section 76.901(c) of the Commission’s rules and is owned by a small cable company as defined in section 76.901(e); or (ii) a system that has been granted special relief.

¹⁵ Current rules require operators of small cable systems to provide the information only in response to a bona fide request from a prospective leased access programmer, whereas other cable system operators must provide the information in response to any request for leased access information.

prospective leased access programmers with the following information: “(i) How much of the operator’s leased access set-aside capacity is available; (ii) A complete schedule of the operator’s full-time and part-time leased access rates; (iii) Rates associated with technical and studio costs; and (iv) If specifically requested, a sample leased access contract.” Even with the other modifications to section 76.970(i) that we adopt below, we are persuaded that, absent this change to our rules, some operators of systems that do not qualify as “small” would continue to spend a significant amount of time responding to non-bona fide leased access inquiries.

14. We recognize that this is a change from the Commission’s previous decision to limit the flexibility to respond only to bona fide requests to small cable operators. However, based on the record evidence that both small and large cable operators face significant burdens in responding to leased access requests, we find that there is no longer a reason to limit this flexibility to small cable operators. We further conclude that it does not serve the public interest to require cable operators to continue responding to requests that are not considered bona fide under our rules. We see no evidence that cable operators will use the bona fide request requirement to discourage leasing access, whereas there is clear evidence that cable operators currently are required to undertake the expense of responding to all requests for leased access information even though most such requests do not result in a leased access programming contract.¹⁶ We recognize that some commenters claim that it is difficult for potential leased access programmers to provide the information required for a bona fide leased access request. We find, however, that providing this very basic information is necessary to demonstrate that a leased access programmer is serious about its inquiry. We believe it is reasonable to expect basic information such as the desired contract term, anticipated start date, and nature of programming to be developed prior to submitting a leased access request. To the extent that the responsive information from the cable operator presents a concern for the programmer, for example

¹⁶ We thus are not persuaded by one commenter’s assertion that there is no evidence that cable companies are overwhelmed by the volume of requests by leased access programmers.

regarding the rate schedule, nothing in this change would prevent the programmer from further modifying its request and continuing to negotiate with the cable operator on the terms of an agreement.

15. Contrary to the suggestion of NCTA, we will not permit cable operators to seek further information from potential leased access programmers before responding to a leased access request, such as: (1) how the potential leased access programmer would deliver its programming to the cable system; and (2) an affidavit identifying all of the programmer's owners and declaring that all are in compliance with applicable trade sanctions. We must balance between the competing interests of potential leased access programmers who should be able to obtain basic information that will enable them to determine whether they wish to proceed with a leased access programming contract, and cable operators who should not be required to incur costs in providing information to a programmer that is not seriously committed to securing a leased access contract. We find that the approach we adopt herein strikes an appropriate balance, but we will continue monitoring the marketplace to determine whether any further modifications are needed in the future.¹⁷

16. Timeframe for Responding to Requests. To ease burdens on cable operators, we extend the timeframe within which they must provide prospective leased access programmers with the information specified in section 76.970(i)(1) of our rules, from 15 calendar days to 30 calendar days for cable operators generally, and from 30 calendar days to 45 calendar days for operators of systems subject to small system relief. These timeframes apply only to bona fide requests for information pursuant to section 76.970(i), and not to simple requests for contact information.

17. The record demonstrates that cable operators, especially those with multiple

¹⁷ In addition, we note that section 76.970(i)(2) currently references "paragraph (h)(1) of this section," which does not exist. Instead the rule should have cited current paragraph (i)(1), but given that herein we redesignate paragraph (i) as paragraph (h), no corrective action is needed.

systems, would benefit from having additional time to gather the information specified in section 76.970(i)(1), as is required in response to a request for leased access information. First, section 76.970(i)(1)(i) currently requires the provision of “[h]ow much of the operator’s leased access set-aside capacity is available.” Although as explained above we clarify that cable operators may comply with that requirement by confirming whether there is sufficient capacity for the prospective leased access programmer, operators still will need to analyze current system capacity to make that determination, given that as ACA states capacity is constantly changing “as cable operators add and drop channels, and repurpose system bandwidth from video to broadband services.”

18. Second, section 76.970(i)(1)(ii) requires the provision of “[a] complete schedule of the operator’s full-time and part-time leased access rates.” ACA explains that, because the rate formula utilizes data points that are constantly changing, a cable operator must complete this calculation anew in response to every leased access request for information. ACA further claims the cost of determining the rates can be one thousand dollars or more per request. Third, section 76.970(i)(1)(iii) requires the provision of “[r]ates associated with technical and studio costs.” ACA explains that cable operators may not have standardized technical and studio costs, because these costs must be calculated based on the specific types of services the programmer seeks. Finally, section 76.970(i)(1)(iv) requires, if specifically requested, the provision of “a sample leased access contract.” While some cable operators may have a contract readily available, the record indicates that others may only have an out-of-date contract in their files. For all of these reasons, we find that the current deadlines for providing the information required in response to leased access requests for information are insufficient.¹⁸ Our new requirement that all cable operators need only provide the listed information in response to a bona fide request does not

¹⁸ Some commenters claim that the current deadlines are sufficient, and that cable operators should have the required information readily available. We are not persuaded by these comments; instead we recognize the specific difficulties flagged by cable operators including, in particular, ACA.

alter this analysis, because it may not make it any easier to provide the required information; rather, it could lead to less frequent provision of the information since cable operators will not need to provide it if a request is not bona fide.¹⁹ We see no indication in the record that increasing the timeframe within which cable operators must provide the required information will prejudice programmers seeking to lease access. Rather, programmers seeking to lease access can simply take the longer timeframe into account in deciding when to submit a bona fide request.

19. We extend each deadline by 15 calendar days, such that the general deadline will be 30 days, and the small system deadline will be 45 days. Although NCTA seeks a 45-day response period for all cable operators, we think that tripling the current deadline is excessive. Rather, we find it appropriate to extend each deadline by 15 calendar days, thus maintaining the longer deadline for small cable systems that may lack the resources to gather information as quickly as larger systems. Although one commenter posits that lengthening the deadline could deter potential leased access programmers from seeking access, particularly if their programming is time-sensitive, we see no evidence supporting this concern.

20. Application Fees and Deposits. As proposed by NCTA and supported by others, we permit cable operators to impose a maximum leased access application fee of \$100 per system-specific bona fide request,²⁰ and we deem as reasonable under the Commission's rules a security deposit or prepayment requirement equivalent to up to 60 days of the applicable lease fee.²¹ We agree with commenters that application fees and deposits are justified to help

¹⁹ Given that many of the difficulties discussed in this paragraph apply to operators of single cable systems as well as to operators of multiple cable systems, we will not distinguish between those categories of operators.

²⁰ We will consider one "system-specific bona fide request" to be a request covering a system that is served by a primary headend. If a leased access programmer wishes to provide its leased access programming on the cable operator's system that is served by a different primary headend, then it would be subject to another \$100 application fee.

²¹ A cable operator may assess both an application fee and a deposit or prepayment. By "application fee," we mean a processing fee that the cable operator collects and retains regardless of whether the leased access request ultimately results in carriage. By "deposit" or "prepayment," we mean a fee that the cable operator collects as part of the execution of a leased access agreement and then applies to offset future payments due under the agreement. The FNPRM applied a different definition of "deposit," which would

reimburse cable operators for their leased access costs,²² to discourage frivolous leased access requests, and to reimburse cable operators for situations in which a leased access programmer only leases access for a brief time before the arrangement is terminated due to non-payment.²³ We acknowledge leased access programmers' concerns that any application fee or deposit could dissuade potential leased access programmers, particularly small entities, from seeking to lease access. Accordingly, rather than permitting "nominal" application fees and deposits as proposed in the FNPRM, we establish maximum application fees and deposits at levels that we do not expect will be unduly burdensome for leased access programmers.²⁴ Cable operators may require leased access programmers to pay any application fee before the cable operator provides the information set forth in section 76.970(i)(1) in response to a leased access request,²⁵ whereas a deposit may be assessed as part of the execution of a leased access agreement.

21. We revise section 76.970(i)(1) of our rules to provide that cable operators are required to provide leased access programmers with the information set forth in that section only

have made a deposit part of the leased access request process. We have determined that this approach is not logical, given that the Commission's rules currently refer to leased access security deposits in the context of section 76.971 (addressing leased access terms and conditions) rather than section 76.970 (addressing leased access requests for information).

²² A cable operator's leased access costs include, as ACA states, "processing the application, negotiating terms, and making arrangements for the delivery of programming to the cable headend. Negotiating a leased access agreement can be time consuming, and for small operators often requires the assistance of outside counsel."

²³ While the FNPRM sought comment on whether the Commission should permit only small cable operators to require an application fee or deposit, commenters did not address that issue. We conclude that the rationale for permitting an application fee or deposit discussed herein applies to cable operators of all sizes.

²⁴ Establishing a maximum for application fees and deposits also addresses SBN's concerns that an approach of permitting "nominal" fees and deposits would "engender deal-killing controversies over what fees and deposits are 'nominal.'"

²⁵ Leased access programmers assert that they should not be treated any differently than potential commercial advertisers, to which cable system operators provide information such as rates without requiring any payment. We disagree because, as Charter states, "most leased access programmers lack the performance record and financial resources of commercial programmers with whom the operator would customarily engage." Cable operators thus are justified in assessing fees before the cable operator undertakes the expense of providing the information set forth in section 76.970(i)(1). In addition, cable operators have a different relationship with leased access programmers than with commercial programmers insofar as cable operators are required by statute to engage with leased access programmers, whereas cable operators make a voluntary business decision to engage with commercial programmers.

if the programmer has remitted any application fee that the cable system operator requires up to a maximum of \$100 per system-specific bona fide leased access request for information. The maximum leased access application fee applies to an entire system-specific bona fide request, as defined above. If a programmer amends such a request, the cable operator cannot use the amendment as an opportunity to assess a second application fee. We recognize that permitting a leased access application fee is a departure from past Commission practice. That past practice was based on an expectation that cable operators would be sufficiently protected by the “bona fide” request requirement that then applied only to small cable operators, but as NCTA states, “experience has shown that even bona fide applicants may opt to walk away without signing [an] agreement” which “can leave cable operators with unreimbursed costs”²⁶ which we do not believe Congress intended cable operators to absorb.

22. Section 76.971(d) of our rules already permits cable operators to “require reasonable security deposits or other assurances from users who are unable to prepay in full for access to leased commercial channels.” We hereby deem as reasonable under the Commission’s rules a security deposit or prepayment equivalent to up to 60 days of the applicable lease fee, and we agree with NCTA that 60 days is a reasonable timeframe to enable cable operators to protect themselves against lessees that fail to pay after launching. This approach will address concerns that the current case-by-case determination of what constitutes a “reasonable” deposit leads to marketplace uncertainty. A cable operator may choose to assess either a security deposit or prepayment that exceeds 60 days of the applicable lease fee, but such an assessment would remain subject to the current case-by-case review process if the programmer asserts that it is not reasonable. While one leased access programmer advocates a maximum deposit equivalent to the cost of a single day of airtime, we find that such an amount would be insufficient to protect cable operators from a leased access programmer that ceases paying for access prior to the completion

²⁶ We thus conclude that, even given the adoption of the proposal to require all cable operators to respond only to bona fide leased access requests, permitting application fees remains reasonable and justified.

of its agreement's term, which will now be a minimum of one year. Because a deposit is assessed as part of the execution of a leased access agreement, it will either be applied to payments due under the agreement, or it will be retained by the cable operator to compensate it for the leased access programmer's failure to remit payments required by the agreement. We see no reason to modify the existing requirement of section 76.971(d) that reasonable security deposits are permitted only if the leased access user does not prepay in full because if the leased access user prepays in full, the cable operator does not need protection against nonpayment.

23. We reject requests by cable operators to impose additional new financial requirements on leased access programmers aside from application fees and deposits. Specifically, ACA proposes that the Commission permit cable operators to assess a "closing fee" upon finalization of a leased access agreement. We find that giving cable operators this flexibility is not necessary because it is intended to address the same cable operator concerns as the application fee and security deposit. NCTA proposes that cable operators "should be permitted to require an acknowledgement in the application that certain ordinary commercial protections will apply, including that a lessee must provide proof of insurance . . . and pass a credit check prior to entering into a lease." In addition, NCTA requests that the rules "provide that if a leased access user has previously been dropped for non-payment, an operator can refuse to enter into a leasing agreement with that entity or its principals in the future." We note that our rules already permit cable operators to "impose reasonable insurance requirements on leased access programmers," and we decline to adopt further protections for cable operators against non-payment by leased access programmers given the expected sufficiency of the application fees and deposits that we authorize today.

24. Contact Information. We adopt a requirement that cable operators provide potential leased access programmers with contact information for the person responsible for leased access matters. Multiple commenters support a leased access contact information requirement, and none oppose it. We provide flexibility for cable operators in complying with

this requirement by permitting them to disclose on their own websites, or through alternate means if they do not have their own websites,²⁷ basic contact information including the name or title, telephone number, and email address for the person responsible for responding to requests for information about leased access channels. This information is necessary for potential leased access programmers to initiate productive contact with cable systems, which is vital to the leased access process, and our approach is consistent with the contact information requirements the Commission has adopted in other contexts. We provide further flexibility by requiring cable operators to provide either a contact person's name or title.²⁸ This approach eliminates the need to update the website due to personnel changes, and it is permissible so long as the provided telephone number and email address reach the appropriate person. However, a cable operator provides the required contact information, it should be reasonably identifiable, though it need not appear on a cable operator's main webpage.²⁹

25. Dispute Procedures. As proposed in the FNPRM, we adopt common-sense modifications to the procedures for leased access disputes, which no commenter opposed. These modifications resolve inconsistencies between the leased access dispute resolution rule (section 76.975) and the Commission's more general rule governing complaints (section 76.7). First, we adopt the proposal to revise the terminology in section 76.975 by referencing an answer to a petition, rather than a response to a petition. Second, we adopt the proposal to modify section 76.975 by calculating the 30-day timeframe for filing an answer to a leased access petition from

²⁷ For example, a cable operator that does not have its own website could post its contact information on a third-party website, such as the website of a cable or programmer trade association, and it could train employees to provide that website to callers inquiring about leased access matters.

²⁸ For example, rather than specifying the contact person's name, Cox has opted to provide that communications should be directed to the "Leased Access Coordinator" and it lists an email address for this person.

²⁹ Although the Commission adopted a comparable requirement in the 2008 Leased Access Order, that requirement never went into effect because OMB disapproved of the information collection requirements contained in that order. The reasons for the disapproval, however, were not specifically related to the contact information requirement, and as explained above we have minimized burdens of the new contact information requirement by providing cable operators with flexibility in complying.

the date of service of the petition, rather than from the date on which the petition was filed.

Third, whereas section 76.975 currently does not include any allowance for replies, we adopt the proposal to add a provision stating that replies to answers must be filed within 15 days after submission of the answer.³⁰ Fourth, we adopt the proposal to add to section 76.975 a statement that section 76.7 applies to petitions for relief filed under section 76.975, unless otherwise provided in section 76.975. We expect that these modifications will make dispute procedures clearer both for the parties to a leased access dispute and for the Commission.³¹

26. Other Issues. Commenters put forth several additional proposals in response to the FNPRM, and we reject the proposals at this time as follows.

27. HD leased access. We will not require cable systems to carry leased access programming in high definition (HD).³² Rather, HD carriage is at the discretion of the cable operator. This approach is consistent with the Act, which does not require cable systems to carry leased access programming in HD. Carrying leased access programming in HD expands the use of spectrum without increasing the volume of leased access programming distributed. Further, we note that cable operators negotiate to carry even some commercial programming in standard definition (SD).

28. Insurance requirements. We decline to adopt new limits on the insurance requirements that cable operators may impose on leased access programmers. We find that this proposal is inconsistent with the Cable Services Bureau's prior conclusion that a cable operator

³⁰ The FNPRM sought comment on whether 15 days is the appropriate timeframe for submitting a reply to an answer to a leased access petition. Commenters did not address this issue, with the exception of Jones's support of the Commission's 15-day proposal. To be consistent with the answer filing deadline, which is 20 days under the general complaint-filing rule but 30 days under the leased access rule, we find that it is appropriate for the reply filing deadline to be 10 days under the general complaint-filing rule but 15 days under the leased access rule.

³¹ Although some commenters argue that we should make additional changes to make the dispute resolution process faster and more efficient, we find insufficient justification for such changes at this time. We will revisit these issues in the future if we determine that further modifications to the leased access dispute resolution procedures are needed.

³² While some leased access programmers support a requirement that cable systems carry leased access programming in HD, cable operators object to such a requirement.

has the “right to require reasonable liability insurance coverage for leased access programming.”

We are not persuaded that this conclusion was in error, and leased access programmers have provided no compelling evidence that the Commission should adopt limits on the reasonable insurance requirements that cable operators may impose on leased access programmers, including limits on naming cable affiliates as additional insureds.³³

29. Limited carriage areas. We will not prohibit cable operators from refusing to carry leased access programmers on only a portion of the operator’s system, even if the programmer is willing to pay the reasonable cost of a modulator or other piece of equipment that would be needed to limit the carriage area.³⁴ Rather, consistent with past practice, we will continue evaluating any programmer complaints regarding cable operator denials of leased access carriage on a case-by-case basis. We agree with Charter that the Act “does not require that leased access be accommodated in this piece-meal fashion.” Customers depend on a consistent channel lineup in a given geographic area, and cable operators should not be required to reconfigure their systems to make leased access programming available only on a portion of the system. Indeed, if the Commission permitted every leased access programmer to provide a modulator and request a custom service area, the ensuing technical and operational burdens on cable operators easily could become unmanageable.

30. Disclosure requirements. We decline to modify the information that cable system operators must provide prospective leased access programmers, as set forth in section 76.970(i)(1) of our rules, except for the elimination of the reference to part-time rates discussed above. ACA proposes that we could ease burdens on cable operators by: (1) permitting them to provide ACA’s proposed safe harbor rates, or a rate estimate, rather than a complete rate

³³ note that last year the Media Bureau dismissed in part and otherwise denied a petition alleging that a cable operator failed to demonstrate that its insurance requirement was reasonable. The Bureau concluded that “[t]he threshold issue of whether a cable operator may require insurance coverage for leased access programming is settled,” and the cable operator “was reasonable to require insurance coverage in this instance.”

³⁴ LAPA proposed that we impose such a prohibition.

schedule; (2) eliminating the requirement that they provide rates associated with technical and studio costs; and (3) eliminating the requirement that they provide sample contracts, or permitting them to provide term sheets instead of sample contracts. We find that a leased access programmer may need to review the rate schedule, technical and studio costs, and a sample contract before deciding whether to proceed in leasing access under our current rules. We therefore decline to adopt ACA's proposals at this time.³⁵

31. Other proposals. We note that commenters responding to the FNPRM raised several additional proposals on a variety of topics, which are not fully developed in the record or are outside the scope of this proceeding.³⁶ We decline to address any of these proposals at this time because we find that it is preferable to monitor the impact of the rule changes we adopt today before deciding if any of these modifications are needed.

32. The First Amendment. The changes in the video marketplace described above call into question whether our leased access rules are consistent with the First Amendment. Specifically, while the leased access rules were originally justified as safeguarding competition and diversity in the face of cable operators' monopoly power, the growth in available platforms to distribute programming seems to have eroded this justification. We sought comment on this issue in the FNPRM. Some commenters argue that changes in the marketplace mean that strict scrutiny may be the appropriate standard of review for the leased access statute today. Some commenters further claim that even under intermediate scrutiny, which is the standard the D.C. Circuit applied when it upheld the leased access statute in 1996, marketplace changes would dictate a finding that

³⁵ Similarly, we find that the costs to cable operators of providing potential leased access programmers with extensive additional information would outweigh the potential benefits of providing that additional information to prospective leased access programmers. Accordingly, we decline to adopt such requirements. We note, however, that we do adopt leased access contact information requirements. In addition, current rules require disclosure of "[a] complete schedule of the operator's full-time and part-time leased access rates."

³⁶ In addition, SBN asks the Commission to "clarify that independent programmers have the same right of access to multichannel video systems owned by telephone companies as they have to other cable systems." To the extent there is any doubt, we clarify that a telephone company that is acting as a "cable operator" is subject to the leased access requirements in the same manner as any other cable operator.

the leased access regime is no longer consistent with the First Amendment. Because changes in the marketplace have dramatically increased diversity and competition in the video programming market, these commenters argue, the leased access rules are no longer necessary to further the government's interest in promoting these goals.

33. We agree that dramatic changes in technology and the marketplace for the distribution of programming cast substantial doubt on the constitutional foundation for our leased access rules. We recognize that we rejected similar constitutional arguments in the 2008 Leased Access Order, which we vacate today. Our analysis has changed because the facts have changed: as explained above, the growth in alternative outlets for programmers—particularly on the Internet—has exploded in the decade since the adoption of the 2008 Leased Access Order. Given this proliferation of new distribution platforms, we now find that the First Amendment concerns raised by commenters provide additional reason to interpret the statutory obligations of section 612 in a manner that reduces burdens on the speech of cable operators. We do so here by, among other things, eliminating the Commission rule requiring that cable operators make leased access available on a part-time basis. While our rule changes are independently and sufficiently supported by the policy justifications above, we note that constitutional concerns rely on the same premise: that changes in the video marketplace have substantially weakened the justifications for leased access.³⁷

34. Procedural Matters. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) relating to the Report and Order. In summary, the Report and Order updates the Commission's leased access rules as part of its Modernization of Media Regulation Initiative. First, we adopt the FNPRM's tentative conclusion that we should vacate the Commission's 2008 Leased Access

³⁷ In the related Section Further Notice of Proposed Rulemaking, we seek further comment on the constitutionality of the Commission's overall leased access regime, which the Commission adopted pursuant to express Congressional authorization.

Order. Second, we adopt certain updates and improvements to our existing leased access rules. The action is authorized pursuant to sections 4(i), 303, and 612 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303, and 532. The types of small entities that may be affected by the proposals contained in the FNPRM fall within the following categories: Cable Television Distribution Services, Cable Companies and Systems (Rate Regulation), Cable System Operators (Telecom Act Standard), Cable and Other Subscription Programming, Motion Picture and Video Production, and Motion Picture and Video Distribution. The projected reporting, recordkeeping, and other compliance requirements are: (1) Vacating the 2008 Leased Access Order, including the Further Notice of Proposed Rulemaking issued in conjunction with that order; (2) Eliminating the requirement that cable operators make leased access available on a part-time basis; (3) Adopting the proposal set out in the FNPRM to ease burdens on cable operators by revising § 76.970(i) of our rules to provide that all cable operators, and not just those that qualify as “small systems” under that rule, are required to respond to a request for leased access information only if the request is bona fide; (4) Easing burdens on cable operators by extending the timeframe within which they must provide prospective leased access programmers with the information specified in § 76.970(i)(1) of our rules, from 15 calendar days to 30 calendar days for cable operators generally, and from 30 calendar days to 45 calendar days for operators of systems subject to small system relief; (5) Permitting cable operators to impose a maximum leased access application fee of \$100 per system-specific bona fide request, and deeming as reasonable under the Commission’s rules a security deposit or prepayment requirement equivalent to up to 60 days of the applicable lease fee; (6) Adopting a requirement that cable operators provide potential leased access programmers with contact information for the person responsible for leased access matters; and (7) Adopting common-sense modifications to the procedures for leased access disputes, which no commenter opposed. Finally, commenters put forth several additional proposals in response to the FNPRM, and we reject the proposals at this time. The SBA did not file comments. Many of the actions taken in the Report and Order will

ease burdens, including economic burdens, on cable operators of all sizes. The changes in the Report and Order that ease burdens on cable operators, such as the elimination of part-time leased access, may also impact leased access programmers, including small programmers. We find that the marketplace changes discussed above, including in particular the availability of online platforms for these small programmers to distribute their content, justify this approach. The Report and Order considered alternatives to take into account the impact on small entities as follows: (1) The Report and Order concludes that eliminating part-time leased access entirely is a preferable approach to the alternative of establishing a set minimum amount of leased access programming, given the alternative means of distribution available to programmers today and the costs that part-time leased access imposes on cable operators. (2) While we consider one commenter's alternative proposal of a 45-day response period for all cable operators, we conclude that tripling the current deadline is excessive.

35. The Report and Order contains new or revised information collection requirements, as reflected in the Final Rules, §§ 76.970(h) and 76.975(e). The Commission, as part of its continuing effort to reduce paperwork burdens, will invite the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3501-3520). In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), the Commission previously sought specific comment on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

36. The Commission will send a copy of the Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

37. Ordering Clauses. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in sections 4(i), 303, and 612 of the Communications Act of 1934, as amended,

47 U.S.C. 154(i), 303, and 532, this Report and Order **IS HEREBY ADOPTED**.

38. **IT IS FURTHER ORDERED** that part 76 of the Commission's rules, 47 CFR part 76, **IS AMENDED** as set forth below, and such rule amendments shall be effective thirty (30) days after the date of publication in the Federal Register, except for §§ 76.970(h) and 76.975(e) that contain new or modified information collection requirements, which shall become effective after the Commission publishes a notice in the Federal Register announcing OMB approval and the relevant effective date.

39. **IT IS FURTHER ORDERED** that the Commission's Report and Order and Further Notice of Proposed Rulemaking in the Leased Commercial Access proceeding, MB Docket No. 07-42, FCC 07-208, **IS HEREBY VACATED**.

40. **IT IS FURTHER ORDERED** that the March 28, 2008 Request of National Cable & Telecommunications Association for a Stay, MB Docket No. 07-42, **IS DISMISSED AS MOOT**.

41. **IT IS FURTHER ORDERED** that the March 31, 2008 TVC Broadcasting LLC Petition for Reconsideration, MB Docket No. 07-42, **IS DISMISSED AS MOOT**.

42. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this Report and Order and Second Further Notice of Proposed Rulemaking in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 76

Administrative practice and procedure, Cable television, Reporting and recordkeeping requirements.

FEDERAL COMMUNICATIONS COMMISSION

Katura Jackson,

Federal Register Liaison Officer.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 76 as follows:

PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. In § 76.970:

- A. Revise paragraph (a);
- B. Remove paragraph (h);
- C. Redesignate paragraphs (i) and (j) as paragraphs (h) and (i);
- D., Revise newly redesignated paragraph (h).

The revisions read as follows:

§ 76.970 Commercial leased access rates.

(a) Cable operators shall designate channel capacity for commercial use by persons unaffiliated with the operator, and that seek to lease a programming channel on a full-time basis, in accordance with the requirement of 47 U.S.C. 532. For purposes of 47 U.S.C. 532(b)(1)(A) and (B), only those channels that must be carried pursuant to 47 U.S.C. 534 and 535 qualify as channels that are required for use by Federal law or regulation. For cable systems with 100 or fewer channels, channels that cannot be used

due to technical and safety regulations of the Federal Government (e.g., aeronautical channels) shall be excluded when calculating the set-aside requirement.

* * * * *

(h)(1) Cable system operators shall provide prospective leased access programmers with the following information within 30 calendar days of the date on which a bona fide request for leased access information is made, provided that the programmer has remitted any application fee that the cable system operator requires up to a maximum of \$100 per system-specific bona fide request:

- (i) How much of the operator's leased access set-aside capacity is available;
- (ii) A complete schedule of the operator's full-time leased access rates;
- (iii) Rates associated with technical and studio costs; and
- (iv) If specifically requested, a sample leased access contract.

(2) Operators of systems subject to small system relief shall provide the information required in paragraph (h)(1) of this section within 45 calendar days of a bona fide request from a prospective leased access programmer. For these purposes, systems subject to small system relief are systems that either:

- (i) Qualify as small systems under § 76.901(c) and are owned by a small cable company as defined under § 76.901(e); or
- (ii) Have been granted special relief.

(3) Bona fide requests, as used in this section, are defined as requests from potential leased access programmers that have provided the following information:

- (i) The desired length of a contract term;
- (ii) The anticipated commencement date for carriage; and

(iii) The nature of the programming,

(4) All requests for leased access must be made in writing and must specify the date on which the request was sent to the operator.

(5) Operators shall maintain, for Commission inspection, sufficient supporting documentation to justify the scheduled rates, including supporting contracts, calculations of the implicit fees, and justifications for all adjustments.

(6) Cable system operators shall disclose on their own websites, or through alternate means if they do not have their own websites, a contact name or title, telephone number, and email address for the person responsible for responding to requests for information about leased access channels.

(i) Cable operators are permitted to negotiate rates below the maximum rates permitted in paragraphs (c) through (g) of this section.

§ 76.971 [Amended]

3. Amend § 76.971, by removing paragraph (a)(4).

4. Amend § 76.975 by revising paragraph (e) and adding paragraph (i) to read as follows:

§ 76.975 Commercial leased access dispute resolution.

* * * * *

(e) The cable operator or other respondent will have 30 days from service of the petition to file an answer. If a leased access rate is disputed, the answer must show that the rate charged is not higher than the maximum permitted rate for such leased access, and must be supported by the affidavit of a responsible company official. If, after an answer is submitted, the staff finds a prima facie violation of our rules, the staff may require a

respondent to produce additional information, or specify other procedures necessary for resolution of the proceeding. Replies to answers must be filed within fifteen (15) days after submission of the answer.

* * * * *

(i) Section 76.7 applies to petitions for relief filed under this section, except as otherwise provided in this section.

[FR Doc. 2019-13134 Filed: 6/19/2019 8:45 am; Publication Date: 6/20/2019]